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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-195483

DATE: November 14, 1979

MATTER OF: Major Irvin J. Huntzinger, AUS, Retired

[Claim for Recomputation of Disability Retired Pay]

DIGEST: 1. A service member passed a promotion physical examination and was ordered promoted to the grade of major effective at a later date. In a later physical examination prior to the promotion effective date a disability was found and he was retired for physical disability under 10 U.S.C. 1201, in the grade of captain, as determined under 10 U.S.C. 1372(1). His claim that he should be retired as a major under 10 U.S.C. 1372(3) for retired pay purposes may not be allowed since that provision permits the higher grade only where the disability is found to exist as a result of a promotion physical, which was not the case.

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2. A service member (captain) passed a promotion physical examination and was ordered promoted to the grade of major effective at a later date. In a later physical examination prior to the promotion effective date a disability was found and he was ordered retired. His claim that his retired pay should be based on the grade of major because the medical evaluation board finding that he was medically unfit was improper because subsequent service examinations found him fit may not be allowed. Under 10 U.S.C. 1216, the Secretary of the service concerned is vested with the powers, functions and duties incident to determining fitness for duty of any member of that service and percentage of disability, and not the GAO.

*Retirement pay claims
Disability benefits
Military disability retirement pay
Medical examinations
Retired Army Personnel*

This action is in response to a letter from Major Irvin J. Huntzinger, AUS, Retired, requesting review of the settlement of our Claims Division, dated October 18,

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1973, which disallowed his claim for recomputation of disability retired pay based on the grade of major, rather than that of captain. For the reasons explained below, we sustain the disallowance of his claim.

The record shows that the member was retired from the United States Army in the grade of captain effective October 2, 1970. He was retired for service incurred disability under the provisions of 10 U.S.C. 1201. His retired grade was determined under 10 U.S.C. 1372(1). At the same time he was placed on the AUS retired list with retired pay and transferred to the USAR (Ret. Res.). By letter Orders No. 52-951, dated February 26, 1971, his retirement orders were amended to read that for the purpose of transfer to the USAR (Ret. Res.), his grade was to be that of major under authority of 10 U.S.C. 1374(a).

The member initially contended that the promotion letter dated December 19, 1969, effective July 12, 1970, entitled him to retired pay at the higher grade even though that promotion was later revoked because of a finding of medical unfitness.

Under 10 U.S.C. 1372(3), in order for Major Huntzinger to be entitled to compute retired pay using the grade to which he would have been promoted had it not been for the physical disability for which he was retired, the physical disability had to be found to exist as a result of the promotion physical examination. The record shows that he had satisfactorily passed that examination. The examination in which it was discovered that he did not meet the medical fitness standards for retention as a major was administered later.

Our Office and the courts have consistently viewed 10 U.S.C. 1372(3) as requiring a definite degree of connection between the physical examination at which the disability is discovered and the prospective promotion in order to meet the conditions prescribed to allow retired

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pay to be computed at the higher grade. See 53 Comp. Gen. 425 (1973); 50 Comp. Gen. 508 (1971); Brandt v. United States, 155 Ct. Cl. 345 (1961); and Pfister v. United, 203 Ct. Cl. 459 (1974). Therefore, since it was not the promotion physical which the member failed to pass, 10 U.S.C. 1372(3) would not serve as a basis for his retirement in the grade of major; rather subsection 1372(1) would be controlling. That is, he is entitled to retired pay based on the grade in which he was serving on the date of retirement, which was the grade of captain. While under the provisions of 10 U.S.C. 1374 he was entitled to be placed on the retired list in the grade of major, subsection 1374(d) specifically provides that placement on the retired list in the higher grade will not permit increased pay or other benefits on that basis. See 53 Comp. Gen. 425, 428.

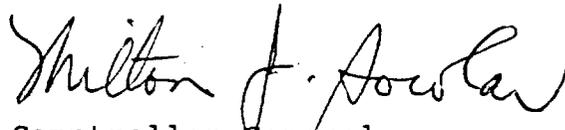
Major Huntzinger now also argues, in essence, that although 10 U.S.C. 1372(3) may not apply in his case, the disability findings by the medical evaluation board which retired him based on the later physical examination, were neither individually nor in combination, sufficient to disqualify him from promotion to the grade of major or from assignment and continuation on active duty. In support of this position, he contends that following his release from active duty he took another service physical examination for Army Reserve purposes and was found to be physically fit for Reserve duty and promotion. It is his view that because of that fact and the fact that he did perform duty in the Reserve thereafter, his promotion to the grade of major was proper and should not have been revoked.

We do not have authority to determine who is or is not fit for retirement or retention in the Armed Forces, the percentage of disability or the grade that any service member is entitled to hold. These are matters which come within the jurisdiction of the Secretary of the service concerned. Under the provisions of 10 U.S.C. 1216, the Secretary of the service concerned has the powers, functions and duties incident to determinations of the fitness for duty of members of the Armed Forces under his jurisdiction

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and the percentage of disability, if any, of a member at the time of separation.

In the circumstances, there is no legal basis upon which we may question the service determination made in Major Huntzinger's case. Accordingly, the action taken by our Claims Division disallowing the claim is sustained.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States